BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAZARO GUTIERREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,023,559
DOLD FOODS, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the April 5, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on July 25, 2007.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes an employment application to Dold Foods, which was attached to the Stipulation the parties filed on February 22, 2007, with the Division of Workers Compensation. Finally, at oral argument before the Board, the parties stipulated claimant's average weekly wage was $662.89.

ISSUES

There is no dispute claimant injured his back at work on April 25, 2005, and that the injury arose out of and in the course of claimant's employment with respondent.

The only issue before Judge Barnes was the nature and extent of claimant's injury. The Judge averaged a 10 percent whole person impairment rating provided by Dr. Robert L. Eyster with a 15 percent whole person rating provided by Dr. Pedro A. Murati and found claimant sustained a 12.5 percent whole person functional impairment. Moreover, the Judge denied claimant's request for a work disability (a permanent disability greater than the functional impairment rating) because respondent had accommodated work it could have provided claimant if respondent had not terminated him for falsifying a

physical assessment questionnaire. That questionnaire, which was completed for the temporary employment agency that placed claimant in respondent's plant, failed to disclose a prior back surgery.

Claimant contends Judge Barnes erred. Claimant argues he did not intentionally falsify the questionnaire. Moreover, claimant argues he could neither read nor speak English when the questionnaire was prepared and the person who completed the form did not ask him about his prior injuries. Consequently, claimant argues he "is being punished for an alleged crime of dishonesty [that occurred] over 5 years ago at another company *that he did not commit.*"[1] Claimant contends there was no bad faith and, therefore, he should receive a work disability. In short, claimant argues he has a 61 percent wage loss ($662.89 per week pre-injury wage compared to $260 per week post-injury) and a 62 or 79 percent task loss, which would create either a 62 or 70 percent work disability.

Respondent contends the April 5, 2007, Award should be modified to reduce claimant's permanent partial general disability from 12.5 percent to 10 percent. Respondent requests the Board to adopt the 10 percent whole person impairment rating provided by Dr. Eyster.

The only issues before the Board on this appeal are:

1. What permanent impairment did claimant sustain as a result of his April 25, 2005, back injury?

2. Is claimant precluded from receiving a work disability because he failed to disclose a prior back injury in the physical assessment questionnaire of the temporary employment agency that initially hired claimant to work in respondent's plant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant was employed by respondent to work at its meat processing plant in Wichita, Kansas. On April 25, 2005, claimant injured his low back at work from lifting meat. There is no dispute that claimant's accident and the resulting back injury arose out of and in the course of claimant's employment with respondent.

[1] Claimant's Submission Letter and Brief at 8 (filed May 4, 2007).

After first consulting with another doctor, claimant began treating with board-certified orthopedic surgeon Dr. Robert L. Eyster. In late July 2005, Dr. Eyster performed a laminectomy and diskectomy on claimant's lumbar spine at the L4-5 intervertebral level. The doctor released claimant from treatment on January 3, 2006, with permanent work restrictions.

Using the fourth edition of the AMA *Guides*[2], Dr. Eyster determined claimant's low back injury comprised a 10 percent whole person impairment. The doctor reviewed a list of work tasks that claimant had performed in the 15-year period before his April 2005 accident and concluded claimant should not perform 21 of the 47 nonduplicated tasks, or 44.7 percent. That list was prepared by respondent's vocational expert, Steve Benjamin.

Dr. Pedro A. Murati evaluated claimant at his attorney's request for purposes of this claim. The doctor examined claimant in early February 2006 and determined claimant had sustained a 15 percent whole person functional impairment as measured by the fourth edition of the AMA *Guides*. Dr. Murati reviewed a list of former work tasks prepared by claimant's vocational expert, Jerry D. Hardin, and concluded claimant should not perform 27 of the 34 nonduplicated tasks, or 79 percent.

But this was not the first time claimant had injured his back. In the late 1990s, claimant injured his back and underwent back surgery by a Dr. Amrani. Claimant remembers the doctor released him from treatment with no restrictions. Nonetheless, that earlier back injury ultimately led to respondent terminating claimant in June 2005 and the denial of his request for work disability benefits in this claim.

The termination

In mid-June 2001, claimant applied for employment with LSI Staffing Solutions (LSI). Part of the application process included a physical assessment questionnaire. As claimant is not proficient in English, claimant requested assistance in completing the questionnaire. The document, which failed to disclose claimant's earlier back problems and surgery, was completed with someone's assistance and signed by claimant. According to claimant, the person who helped him complete the questionnaire did not ask him about prior injuries. At the time claimant applied at LSI, he was aware he would be sent to work at respondent's plant.

Relative to this claim, respondent employed LSI to furnish workers who would work for respondent on a probationary basis with the possibility of being hired on a permanent basis. Apparently claimant satisfied his period of probation as he later completed

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

respondent's application form and was hired on a full-time basis. Respondent's application form and the attached interviewer's form, however, did not have any questions about past injuries or surgeries.

The LSI physical assessment questionnaire did not become an issue until claimant's April 2005 low back injury. While attending claimant's initial medical appointment with Dr. Woolley and attending the resulting MRI, respondent's human resources manager, Aaron Peterson, learned claimant had prior back problems and a prior back surgery. Reviewing claimant's file, Mr. Peterson then learned the physical assessment questionnaire that claimant completed for LSI did not disclose that earlier back surgery. Mr. Peterson also testified claimant then admitted he did not disclose the surgery on the questionnaire but he knew he should have.

According to Mr. Peterson, the LSI physical assessment questionnaire was part of respondent's pre-employment screening process. Consequently, respondent terminated claimant for falsifying company records. The effective date of claimant's termination was June 10, 2005.

The potential for accommodated employment and work disability

According to Mr. Peterson, had claimant not been terminated respondent could have accommodated Dr. Eyster's work restrictions and that work would have provided claimant with wages comparable to his pre-injury earnings.

Claimant has looked for other work following his termination from respondent's employ. The first job he obtained was with Norcraft in Newton, Kansas, where he worked from January 2006 until mid-May 2006 and earned approximately $300 per week. He next worked for Wilson Building Maintenance, a cleaning company, from the last part of May 2006 through mid-June 2006 and earned approximately $206 per week. Next, claimant worked for Western Uniform from mid-July 2006 through either late October or early November 2006 and earned approximately $260 per week. Finally, in approximately late October 2006 claimant obtained employment with the Hayes Company where he was earning approximately $260 per week when the record for this claim was closed. In short, claimant earned less than 90 percent of the $662.89 average weekly wage he earned working for respondent.

A literal reading of K.S.A. 44-510e would indicate claimant is entitled to receive a permanent partial general disability based upon his wage loss and his task loss. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

> ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. For example, *Foulk*[3] and *Copeland*[4] held that workers must make a good faith effort to work or to find appropriate employment after their injuries before they are entitled to receive a work disability under K.S.A. 44-510e. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Workers Compensation Act.

In *Ramirez*[6], the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. But the Workers Compensation Act contains no provision that an incomplete or erroneous pre-employment application precludes an award of work disability. Indeed, the injured worker in *Ramirez* probably felt the court's holding was

---

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

especially punitive as the injury that was not disclosed in the pre-employment application was not related in any manner to the injury he later sustained.

And in *Mahan*[7], the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[8]

Again, the Act contains no such provision that failing to make a good faith effort to retain employment is a valid defense to a claim for disability benefits. Indeed, in *Oliver*[9] the Kansas Court of Appeals held that neither K.S.A. 1998 Supp. 44-510e(a) nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*[10], the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment.

> Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer. *The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment.* An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails

---

[7] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[8] *Id.* at 321.

[9] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[10] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

> in this effort, "the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." *Copeland*, 24 Kan. App. 2d at 320.[11]

The Kansas Supreme Court, however, has recently sent two strong signals that the Workers Compensation Act should be applied as written. In *Graham*[12], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[13]

Moreover, in *Casco*[14], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[15]

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts. Consequently, the Board is compelled to follow the law set forth in *Ramirez*[16].

Nonetheless, *Ramirez* does not dictate the outcome of this claim as its facts are distinguishable. In *Ramirez*, the erroneous job application belonged to the employer. In

---

[11] *Id.* at 185 (emphasis added).

[12] *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007).

[13] *Id.* at Syl. ¶ 3.

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[15] *Id.* at Syl. ¶ 6.

[16] *Ramirez*, 26 Kan. App. 2d 139.

this claim, the offensive document was LSI's and not respondent's. When claimant was later hired by respondent he completed a new job application that did not ask about prior surgeries. These facts neither establish that respondent acted in good faith in terminating claimant or that claimant failed to make a good faith effort to perform accommodated work. Claimant is not attempting to manipulate the workers compensation system. Accordingly, claimant is not precluded from receiving a work disability under K.S.A. 44-510e.

K.S.A. 44-510e states that work disability is determined by averaging an injured worker's task loss and wage loss. Claimant has made a good faith effort to find other work and, therefore, his actual wage loss should be used.[17] When the record was closed, claimant was earning $260 per week. Consequently, claimant has sustained a 61 percent wage loss.

Giving equal weight to the 44.7 percent task loss percentage provided by Dr. Eyster and the 79 percent task loss percentage provided by Dr. Murati, the Board finds claimant has sustained a 62 percent task loss due to his April 25, 2005, accident. And averaging the 61 percent wage loss with the 62 percent task loss yields a 62 percent work disability, which is the appropriate measure of claimant's permanent partial general disability.

The Board affirms the Judge's finding that claimant sustained a 12.5 percent whole person impairment due to his April 2005 accident and resulting back injury.

Based upon the above, the April 5, 2007, Award must be modified to award claimant a 62 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the April 5, 2007, Award entered by Judge Barnes.

Lazaro Gutierrez is granted compensation from Dold Foods, Inc., for an April 25, 2005, accident and resulting disability. Based upon an average weekly wage of $662.89, Mr. Gutierrez is entitled to receive 27 weeks of temporary total disability benefits at $441.95 per week, or $11,932.65, plus 199.27 weeks of permanent partial general disability benefits at $441.95 per week, or $88,067.35, for a 62 percent permanent partial general disability and a total award not to exceed $100,000.

[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

As of October 5, 2007, Mr. Gutierrez is entitled to receive 27 weeks of temporary total disability compensation at $441.95 per week, or $11,932.65, plus 100.43 weeks of permanent partial general disability compensation at $441.95 per week, or $44,385.04, for a total due and owing of $56,317.69, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $43,682.31 shall be paid at $441.95 per week until paid or until further order of the Director.[18]

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

[18] Because of the statutory scheme of accelerated payout, in this instance claimant is entitled to the same number of weeks of benefits at the same compensation rate during the different post-injury periods whether that period is based upon claimant's most recent post-injury average weekly wage and resulting 62 percent work disability or whether it is based upon each respective period's actual average weekly wage and resulting work disability.